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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

Case No. 3:18-cv-01586-JSC

**DEFENDANT CHART INC.'S
MOTION FOR SUMMARY
JUDGMENT**

Date: March 4, 2021
Time: 9:00 a.m.
Judge: Hon. Jacqueline Scott Corley
Place: Zoom

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NOTICE OF MOTION AND MOTION

TO ALL ATTORNEYS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 4, 2021, at 9 a.m., before the Honorable Jacqueline Scott Corley, Defendant Chart Inc. will and does hereby move the Court for summary judgment or, alternatively, for partial summary judgment on a portion of Plaintiffs' claims.

This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, the Declaration of Kevin M. Ringel, pleadings and other documents on file in this action, any oral or documentary evidence or argument as may be requested by the Court, and any other information the Court deems proper and necessary.

Dated: December 22, 2020

Respectfully submitted,

By: /s/ Kevin Ringel

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Chart Inc. respectfully submits this memorandum of points and authorities in support of its motion for summary judgment.

I. INTRODUCTION

On March 4, 2018, Dr. Joseph Conaghan, the lab director at Pacific Fertility Center (PFC), discovered that one of PFC's cryogenic freezers, a Chart, Inc. model MVE 808 used to store cryopreserved eggs and embryos (Tank 4), had insufficient liquid nitrogen and unsafely high temperatures. The Plaintiffs'¹ claims arise out of that discovery: they claim that Tank 4 failed because of an allegedly defective weld near the bottom of the tank. The weld, the Plaintiffs allege, did not withstand exposure to normal thermal stresses, cracked, and caused Tank 4 to immediately lose its vacuum seal. Plaintiffs further allege that Tank 4's computer controller, the TEC 3000 which (among many other things) monitored Tank 4's liquid nitrogen (LN2) levels and temperature, stopped fully functioning before the incident. They bring three claims: (1) a strict products liability claim based on an alleged manufacturing defect; (2) a strict products liability claim alleging a design defect under both the consumer expectations test and the risk-benefit test; and (3) negligent failure to recall.

PFC is entitled to summary judgment on each of those claims. First, Plaintiffs have not offered admissible expert opinion testimony required to support the causation element of their strict liability claims alleging manufacturing defect and design defect.² Their liability expert, Anand Kasbekar, is not qualified to render cryogenic opinions, and he employed a flawed

¹ This motion addresses the five bellwether claims alleged in the instant Third Amended Complaint for Plaintiffs A.B., C.D., E.F., G.H., and I.J. (Docket No. 578).

² Chart also adopts and incorporates the arguments raised in its Motion to Exclude Plaintiffs' Experts into this Motion for Summary Judgment.

1 methodology that does not withstand *Daubert* scrutiny.³ Because his causation opinion is
2 inadmissible, the Plaintiffs claims predicated on a manufacturing defect theory fail. Second, for
3 similar reasons, Plaintiffs' design defect claims fail. They failed to offer admissible expert
4 opinions related to causation; and, the consumer expectations test is not applicable in this case,
5 where the mechanics of Tank 4 and the reasons for its alleged failure are technical scientific and
6 engineering questions well beyond the ken of an ordinary juror. Third, Chart is entitled to
7 summary judgment on Plaintiffs' negligent failure to recall claim. That claim is premised on
8 allegations that Tank 4's controller, the TEC 3000, was prone to malfunctioning, that Chart should
9 have anticipated that users would disable the controller as a result, and that Chart should have
10 recalled and replaced all of those controllers. However, Plaintiffs did not disclose an expert to
11 opine on any defects in the controller, or how any alleged *controller* issues caused *Tank 4* to fail
12 and, in turn, caused any damage to their tissue stored in Tank 4. Plaintiffs were required to offer
13 admissible expert opinion testimony about the controller, the mechanics of the control system,
14 Plaintiffs' theory about how or why the controller malfunctioned, Plaintiffs' theory about why a
15 controller recall would have prevented any issues related to Tank 4, or Plaintiffs' theory about how
16 or why they were damaged as a result. They cannot establish causation or any entitlement to
17 damages, much less exemplary damages.
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21 Finally, even if, alternatively, this Court were to allow some of Plaintiffs' claims to move
22 forward, a portion of Plaintiffs' damages claims should be barred. Plaintiffs' experts conceded
23 that one of the Plaintiffs, G.H., had a less than a 50% chance of achieving a live birth with the
24 cryopreserved eggs stored in Tank 4 at the time of the March 4, 2018 incident.
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³ Chart has contemporaneously filed a *Daubert* motion to exclude Kasbekar.

II. STATEMENT OF FACTS

A. Chart's Product – the MVE 808 Cryogenic Freezer.

Tank 4 is a Chart model MVE 808-AF-GB, a cryopreservation freezer in which biological material is immersed in liquid nitrogen for extreme cold storage. (Ringel Decl., Ex. A at 2). Chart made the freezer with two primary design features. First, Chart made a double-walled, vacuum insulated tank, which is more commonly known as a dewar. Second, Chart incorporated a supplier's computer controller, the TEC 3000, to operate the freezer under the supervision of lab personnel. (Ringel Decl., Ex. A at 2-3). Liquid nitrogen in the tank boils away over time, both from heat slowly leaking into the cold space, and from the occasional removal of the top lid to add or remove patient samples stored in the tank. (Ringel Decl., Ex. A at 2). The controller senses the level of liquid nitrogen in the dewar. (Ringel Decl., Ex. A at 2). When it drops to a level set by the user, the controller automatically opens a valve allowing liquid nitrogen to flow from a liquid nitrogen supply tank into the dewar through a connected, vacuum-insulated piping system. (Ringel Decl., Ex. A at 2; Ringel Decl., Ex. B at 45:6-46:13). The controller also monitors temperature levels, calculates the rate of liquid nitrogen use by units of inches per day, and alarms if it observes the temperature rising. (Ringel Decl., Ex. A at 2-3). And, the controller contains fail-safe features such as a Sensaphone device that calls and text messages end users to alert them to a rise in temperature, an increase in liquid nitrogen usage, or a low liquid nitrogen level, thereby allowing the end user to remedy the condition and protect any biological material in the tank. (Ringel Decl., Ex. A at 3; *see* Ringel Decl., Ex. B at 56:5-57:2).

B. PFC and the Events Leading Up to the Incident.

PFC's offices, located on the fifth floor of its building, included examination rooms, a procedure area, and an IVF laboratory. (Ringel Decl., Ex. B at 51:6-52:16). The laboratory, a

1 room of approximately 800 square feet, housed three tanks, including Tank 4; and a variety of
2 other equipment including incubators, chambers, and microscopes. (Ringel Decl., Ex. B at 53:7-
3 17). Three other tanks, Tanks 1, 2, and 3, were housed in a storage room adjacent to the laboratory,
4 and additional backup tanks were stored on the building's ground floor. (Ringel Decl., Ex. B at
5 52:23-54:18).

6
7 PFC purchased Tank 4 in 2011 through a third-party distributor. (Ringel Decl., Ex. B at
8 65:9-22). On February 15, 2018, the controller on Tank 4 lost its ability to measure the level of
9 liquid nitrogen in the tank, causing it to alarm. (Ringel Decl., Ex. B at 77:7-23). It started making
10 a beeping sound and also sent an electronic signal to call PFC, alerting it to the alarm. (Ringel
11 Decl., Ex. B at 78:9-20). Dr. Conaghan, PFC's lab director since 1999, investigated and
12 determined that the tank's nitrogen levels were at an acceptable level. (Ringel Decl., Ex. B at
13 67:18-21, 77:17-19, 78:5-8). He decided to unplug the controller from the wall outlet. (Ringel
14 Decl., Ex. B at 79:19-20).

15
16 For the next 17 days, Dr. Conaghan instructed lab workers to plug in the controller once a
17 day to top up LN2 in Tank 4 before closing the lab for the day. (Ringel Decl., Ex. B at 90:23-91:4,
18 93:22-25, 148:25-149:2). Lab workers were also instructed by Dr. Conaghan to manually measure
19 each day the level of LN2 in Tank 4 by inserting a dipstick into the tank. (Ringel Decl., Ex. B at
20 93:22-25). It is not clear whether they did so: although lab employees were expected to record
21 those measurements in Reflections, PFC's recording software, some end-of-day measurements
22 between the date on which Dr. Conaghan unplugged the controller until March 4, 2018 were not
23 contemporaneously recorded. (Ringel Decl., Ex. C at 19:20-26:1). No one from PFC contacted
24 Chart about the issue with the controller. (Ringel Decl., Ex. B at 87:16-88:23).

1 On March 4, 2018, before the lab closed, Dr. Conaghan turned on the autofillers for Tanks
2 6, 5, and 4. (Ringel Decl., Ex. B at 101:7-11). A few minutes later, he attempted to open the lid
3 on Tank 4 to check the LN2 level, but discovered that the lid was stuck. (Ringel Decl., Ex. B at
4 101:12-24, 104:24-105:1). He and embryologist Jean Popwell were able to remove the lid, and
5 Dr. Conaghan noted that the liquid nitrogen level was not as high as the boxes stored inside – the
6 level at which he usually noted it. (Ringel Decl., Ex. B at 101:24-102:1, 105:25-3, 107:9-12). He
7 unsuccessfully attempted to get a dipstick reading of the LN2 level. (Ringel Decl., Ex. B at 110:11-
8 12). He did not notice any condensation on the exterior of Tank 4, but he noticed “a little water
9 on the floor” under and around Tank 4. (Ringel Decl., Ex. B at 115:20-116:5, 136:13-25). Dr.
10 Conaghan added more LN2 to Tank 4; a short time later, the tissue was removed from Tank 4 and
11 placed in a backup tank. (Ringel Decl., Ex. B at 113:12-20, 117:1-4, 119:3-8, 165:20-166:9).

14 According to Dr. Conaghan, by the following day, the interior of Tank 4 appeared mangled
15 and distorted. (Ringel Decl., Ex. B at 117:22-23). The interior of Tank 4 became more deformed
16 over time. (Ringel Decl., Ex. B at 117:13-20).

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18 **C. This Litigation.**

19 This litigation arises out of claims brought by individuals whose eggs and embryos were
20 stored in Tank 4 at the time of the incident. (Third Amended Complaint at 12-13). They allege
21 that Tank 4 failed because of a defective weld near the bottom of the tank: “The weld was too thin
22 and the fit between the welded portions of the tank was improper. As a result, the weld was unable
23 to withstand long-term exposure to normal thermal stresses and eventually cracked.” (Third
24 Amended Complaint at 1). The Plaintiffs allege that, as a result, the tank “immediately lost its
25 vacuum insulation and ability to maintain a safe temperature for PFC’s patients’ eggs and
26 embryos,” and that the “cracked weld also triggered an implosion of the tank’s inner vessel.”
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1 (Third Amended Complaint at 1). Because Tank 4 failed, the Plaintiffs claim, “material from Tank
2 4 is far less likely to produce a thawed egg or embryo viable for transfer and implantation, far less
3 likely to result in clinical pregnancy, and far less likely to result in a live birth.” (Third Amended
4 Complaint at 13). The Plaintiffs also claim that “Tank 4’s electronic controller – which monitors
5 liquid nitrogen levels and temperature – malfunctioned shortly before the incident. *To the extent*
6 *that this malfunctioning controller contributed to the harm suffered by Plaintiffs*, Chart is
7 responsible for that as well.” (Third Amended Complaint at 12) (emphasis added).

9 Based on those allegations, Plaintiffs plead three causes of action. (Third Amended
10 Complaint a 13-15). First, they allege strict products liability – manufacturing defect, claiming
11 that Tank 4 contained “at least one manufacturing defect when it left Chart’s possession. In
12 particular, the weld at the liquid nitrogen fill port, which should have sealed the tank’s vacuum
13 space, was defective[.]” (Third Amended Complaint at 13). Second, they allege that Chart is
14 strictly liable for purported design defects in Tank 4 under the consumer expectations “and/or” the
15 risk-benefit test. (Third Amended Complaint at 13). Third, the Plaintiffs seek damages for Chart’s
16 alleged negligent failure to recall or retrofit Tank 4 because of the allegedly faulty controller.
17 (Third Amended Complaint at 14-15). Specifically, the Plaintiffs maintain that Chart knew the
18 controller was “prone to malfunction, leading to inaccurate measurements and false alarms,” and
19 that it was “reasonably foreseeable” that if a controller malfunctioned, a customer “would continue
20 to use their cryogenic freezers without a fully functional controller.” (Third Amended Complaint
21 at 15). The Plaintiffs also allege that Chart “knew prior to March 4, 2018 that it was possible for
22 the welds in its freezers to crack, causing an inner vessel implosion, total vacuum loss, and loss of
23 function.” (Third Amended Complaint at 15). According to the Plaintiffs, because of “what Chart
24 knew about the likelihood of a TEC 3000 electronic controller malfunction and the risks posed by
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1 that malfunction, Chart should have recalled or retrofitted all tanks equipped with a TEC 3000
2 electronic control system prior to March 4, 2018.” (Third Amended Complaint at 15). The
3 Plaintiffs claim they are also entitled to exemplary damages for Chart’s failure to recall Tank 4.
4 (Third Amended Complaint at 15).

5 In support of their claims, the Plaintiffs identified five experts: Kasbekar; Wininger;
6 Stephen Somkuti, a reproductive endocrinologist; Elizabeth Grill, a psychologist; and Nicholas
7 Jewell, a biostatistician. Chart identified seven experts: Franklin Miller, a cryogenic engineer;
8 Ron Parrington, a metallurgist; Grace Centola, an expert lab director; Eve Feinberg, a reproductive
9 endocrinologist; Angela Lawson, a psychologist; John Cauthen, a digital forensic examiner; and
10 Eldon Leaphart, an electrical engineer. Only certain opinions offered by Kasbekar, Wininger, and
11 Somkuti are relevant to this motion.
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14 Kasbekar claimed that “the cause of the failure [of Tank 4] was a breach in the interior wall
15 of the tank at the annular weld that attaches the fill port fitting to the inner tank wall.” (Ringel
16 Decl., Ex. D at 60). The weld, Kasbekar maintained, “lacked adequate penetration and failed to
17 fuse together the tank wall and fitting.” (Ringel Decl., Ex. D at 60). Kasbekar premised his
18 opinions on his assumption that Tank 4 contained approximately 14 inches of liquid nitrogen on
19 March 3, 2018 – the day before the incident. (Ringel Decl., Ex. D at 37-38). Liquid nitrogen,
20 Kasbekar argued, leaked into the vacuum space through the cracked weld at the fill port, causing
21 the space to expand and the tank to deform. (Ringel Decl., Ex. D at 60). According to Kasbekar,
22 “Chart knew that leakage of liquid nitrogen into the vacuum space followed by an expansion from
23 liquid to gas as the tank warmed over time would result in the subsequent implosion or collapse of
24 the inner vessel.” (Ringel Decl., Ex. D at 60). Kasbekar opined that weld was the root cause of
25 the issue because the one-sided weld lacked sufficient strength to withstand thermal stress and was
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1 susceptible to cracking. (Ringel Decl., Ex. D at 62). He further opined that Chart could have made
 2 the weld joint more robust or made the inner tank thicker. (Ringel Decl., Ex. D at 63). Kasbekar
 3 offered no opinions related to the controller.

4 Plaintiffs' counsel acknowledged that Wininger, an embryologist, was "not an engineer put
 5 forth to opine on the mechanical failure of the tank." (Ringel Decl., Ex. E at 37:11-13). Rather,
 6 Wininger sought to opine, among other things, about consumer expectations. He claimed that
 7 users of cryogenic tanks "do not expect them to suffer a sudden and total loss of vacuum
 8 insulation" or excessive use of liquid nitrogen. (Ringel Decl., Ex. F at 14).

10 Somkuti opined about the likelihood that plaintiff G.H. would achieve a live birth. In 2016,
 11 G.H. had undergone a retrieval and cryopreserved two eggs. According to Somkuti, based on
 12 G.H.'s age and apparent low egg reserve, she had a less than 50 percent chance of a live birth with
 13 the two eggs she cryopreserved in 2016.

15 **III. LEGAL STANDARD**

16 The summary judgment standard is well-established. Summary judgment must be rendered
 17 when the pleadings, depositions, answers to interrogatories, and admissions on file, together with
 18 affidavits, if any, show there is no genuine issue of material fact and the moving party is entitled
 19 to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
 20 (1986). The movant bears the burden of informing the court of the basis for its belief that there is
 21 an absence of a genuine issue for trial and of identifying those portions of the record that
 22 demonstrate such an absence. *Id.*

25 Once the movant makes the initial showing, the opponent the motion must come forward
 26 with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*
 27 *Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). At that point, the opponent
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1 must provide specific admissible facts showing that the case presents a genuine issue of material
 2 fact, such that a reasonable jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*,
 3 477 U.S. 242, 248 (1986). Mere assertions of a factual dispute unsupported by probative and
 4 admissible evidence will not prevent summary judgment. *Id.* at 248-50. Thus, conclusory
 5 statements and unsubstantiated assertions cannot defeat a summary judgment motion. *Taylor v.*
 6 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989). If the nonmoving party fails to show the existence of
 7 an element essential to his case on which he bears the burden of proof, summary judgment must
 8 be granted. *Celotex*, 477 U.S. at 322-32. This court has no duty to search the record for the
 9 nonmoving party for triable issues. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).

11 **IV. ARGUMENT**

12 Each of Plaintiffs' three claims – alleging strict products liability for a manufacturing
 13 defect, strict products liability for a design defect, and negligent failure to recall – fails as a matter
 14 of law. For each, Plaintiffs are required to offer admissible expert testimony establishing both the
 15 existence of a defect and a causal link between the alleged defect and Plaintiffs' claimed injuries.
 16 As explained in Chart's Motion to Exclude, Kasbekar's causation opinion is inadmissible under
 17 Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
 18 509 U.S. 579 (1993) and its progeny. If this Court grants Chart's motion to exclude, Plaintiffs will
 19 have no expert testimony to support their claims and Chart will be entitled to summary judgment.

20 Additionally, Chart is entitled to partial summary judgment on Plaintiffs' negligent failure
 21 to recall claim. That claim alleges that Chart knew of issues with the *controller*, a separate
 22 component from the dewar, and that Chart negligently failed to recall it. However, Plaintiffs have
 23 not offered evidence of causation. The only expert testimony the Plaintiffs offered about any
 24 manufacturing or design defect concerns the weld at the fill port on the tank. There is no expert
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1 testimony establishing that TEC 3000 control system was defective and should have been recalled.
 2 As importantly, there is no expert opinion testimony establishing that a recall of the controller
 3 would have affected the only alleged defect – the weld – that Plaintiffs’ expert has identified, or
 4 that failure to recall the controller caused damage to the Plaintiffs’ tissue inside Tank 4.

5 Finally, in further alternative, this Court should grant partial summary judgment on a
 6 portion of Plaintiffs’ claimed damages. Because there is no evidence that Chart willfully and
 7 consciously ignored any issue with the controller, Plaintiffs are not entitled to exemplary damages
 8 under any negligent failure to recall claim. And, G.H. is not entitled to seek damages for any
 9 possible inability to successfully achieve a live birth where, according to her own expert, her odds
 10 of success before the March 4, 2018 incident were already less than 50 percent.
 11

12
 13 **A. Because Kasbekar’s Opinion Testimony Is Not Admissible, the Plaintiffs**
 14 **Cannot Establish Causation.**

15 First and foremost, because Kasbekar’s causation opinion is not admissible, the Plaintiffs
 16 cannot establish a necessary element of any of their product liability claims. For any products
 17 liability claim, a plaintiff may seek to recover in strict liability, whether in tort or negligence. *Scott*
 18 *v. C.R. Bard, Inc.*, (2014) 231 Cal. App. 4th 763, 773. Under either theory, “the plaintiff must
 19 prove that a defect caused the injury,” either because of a design defect or a manufacturing defect.
 20 *Id.*; see *Demara v. The Raymond Corp.*, (2017) 13 Cal. App. 5th 545, 554 (observing that to prove
 21 causation in a products liability case, a plaintiff must “prove that the defective products supplied
 22 by the defendant were a substantial factor in bringing about his or her injury”).
 23

24 The plaintiff has the burden of proof on specific material facts such as causation. *Demara*,
 25 13 Cal. App. 5th at 555. “A product liability case must be based on substantial evidence
 26 establishing both the defect and causation (a substantial probability that the design defect, and not
 27 something else, caused the plaintiff’s injury) and where, as here, the complexity of the causation
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1 issue is beyond common experience, expert testimony is required to establish causation.” *Stephen*
 2 *v. Ford Motor Co.*, (2005) 37 Cal. App. 4th 1363, 1373. Because Plaintiffs cannot satisfy the
 3 causation requirement for any of their three claims, Chart is entitled to summary judgment on all
 4 of them. *Lust By & Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996)
 5 (affirming summary judgment for the defendant manufacturer and district court’s exclusion of the
 6 plaintiff’s expert’s causation opinion under *Daubert*).
 7

8 It should be noted that Chart is entitled to summary judgment on Plaintiffs’ design defect
 9 claim regardless of whether this Court evaluates that claim using the consumer expectations test
 10 or the risk-benefit test. Under California law, defective design can be established under two
 11 theories: “(1) the consumer expectations test, which asks whether the product performed as safely
 12 as an ordinary consumer would expect when used in an intended and reasonably foreseeable
 13 manner; or (2) the risk/benefit test, which asks whether the benefits of the challenged design
 14 outweigh the risk of danger inherent in the design.” *Saller v. Crown Cork & Seal Co., Inc.*, (2010)
 15 187 Cal. App. 4th 1220, 1232. California reserves the consumer expectations test for cases where,
 16 “it is clear that a product violates ordinary consumer expectations only when the circumstances
 17 arouse such reasonable expectations based on common experience of the product’s users[.]” *Soule*
 18 *v. General Motors Corp.*, (1994) 8 Cal. 4th 548, 564. Said another way, the consumer expectations
 19 test is “reserved for cases in which the *everyday experience* of the product’s users permits a
 20 conclusion that the product’s design violated *minimum* safety assumptions, and is thus defective
 21 *regardless of expert opinions about the merits of the design.*” *Id.* at 657 (emphasis in original).
 22 However, a “complex product, even when it is being used as intended, may often cause injury in
 23 a way that does not engage its ordinary consumers’ reasonable minimum assumptions about safe
 24 performance.” *Id.*
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1 Such is the case here. Tank 4 is a complex product. Even if it were being used as intended
2 – something Chart disputes, given Dr. Conaghan’s decision to unplug Tank 4’s controller, thereby
3 disabling its temperature monitoring, fill, alarm, calling and texting features – it is not in the
4 everyday experiences of an average juror to understand the use of a computer controlled cryogenic
5 freezer and the complex physics, engineering, and metallurgical principles necessary to evaluate
6 whether Tank 4 experienced a cracked weld because of a supposed defective design or something
7 else. Expert testimony on this topic is necessary in this case.
8

9 **B. Chart Is Entitled to Summary Judgment On Plaintiffs’ Negligent Failure to**
10 **Recall Claim.**

11 Additionally, Chart is entitled to summary judgment on Plaintiffs’ third cause of action
12 alleging negligent failure to recall. (Third Amended Complaint at 14-15). Plaintiffs failed to offer
13 any expert evidence to establish defect or causation for this claim. Unlike their strict liability
14 claims, however, that absence of expert testimony is unrelated to Chart’s *Daubert* arguments.
15 Rather, Plaintiffs’ failure to recall claim is premised on the idea that Tank 4’s *controller* failed and
16 should have been recalled – a topic about which Plaintiff has offered *no* expert testimony.
17

18 As noted above, under either a strict products liability or negligence claim, a plaintiff must
19 show that the alleged defect caused her injury. *Demara*, 13 Cal. App. 5th at 554. She must also
20 show that the product defect was due to negligence of the defendant. *Scott*, 231 Cal. App. 4th at
21 773. And, in cases involving complicated products, a plaintiff must prove those concepts of defect
22 and causation with expert testimony. *Stephen*, 37 Cal. App. 4th at 1373. Moreover, in a negligent
23 failure to recall claim, a plaintiff must prove that a defendant “knew or reasonably should have
24 known that the product was dangerous or was likely to be dangerous when used in a reasonably
25 foreseeable manner,” that the defendant “became aware of this defect after the product was sold,”
26 that the defendant “failed to recall . . . the product,” that a reasonable manufacturer under similar
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1 circumstances would have recalled the product; and that the defendant’s failure to recall the
2 product “was a substantial factor in causing plaintiff’s harm.” CCJI 1223 (internal brackets
3 omitted).

4 Here, the Plaintiffs negligent failure to recall claim focuses not on the allegedly defective
5 weld at the liquid nitrogen port, but rather on the controller – a complicated computer about which
6 Plaintiffs have offered no expert testimony.⁴ According to Plaintiffs, the controller was “prone to
7 malfunction, leading to inaccurate measurements and false alarms.” (Third Amended Complaint
8 at 15). The Plaintiffs also claim that it was reasonably foreseeable that customers would continue
9 to use their cryogenic freezers without a “fully functioning controller.” (Third Amended
10 Complaint at 15). And, Plaintiffs argue, based on what Chart purportedly knew about possible
11 controller issues, Chart should have recalled and retrofitted all tanks fitted with a TEC 3000
12 controller. (Third Amended Complaint at 15).

15 Plaintiffs have offered no evidence to show how Chart’s alleged failure to recall or retrofit
16 the *controller* caused them harm. Plaintiffs’ mechanical engineering expert testified that Tank 4
17 failed as a result of a weld issue. He offered no opinions related to the controller. The alleged
18 weld failure has nothing to do with the controller. Indeed, the alleged controller issue occurred 17
19 days before Dr. Conaghan discovered that Tank 4 had supposedly failed. Plaintiffs have neither
20 offered evidence nor explained how the malfunctioning alarm on the controller relates to or
21 concerns the alleged tank failure, much less how or why Chart owed them any duty to recall the
22 controller. *See, e.g., Montez v. Ford Motor Co.*, (1980) 101 Cal. App. 3d 315, 319-20. That is
23 Plaintiffs’ obligation – they are required to show that the controller’s failure, and Chart’s failure
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28 ⁴ In contrast, Chart *has* disclosed an electrical engineering expert, Mr. Leaphart, who opined that the controller was not unreasonably dangerous.

1 to recall the controller, were substantial factors in causing the Plaintiffs' alleged injuries. *See* CCJI
 2 1223. Without any expert testimony to establish either defect or causation, the Plaintiffs'
 3 controller-related claims fail.

4 One additional matter on this subject should be noted. Although the Plaintiffs do not appear
 5 to make any other claims based on the alleged failure of the controller, to the extent they intend to
 6 argue they are entitled to damages related to the controller issues, they are precluded from doing
 7 so for the same reason their negligent failure to recall claim fails: they have offered no expert
 8 testimony to support any such theory. Chart is entitled to summary judgment on any of Plaintiffs'
 9 claims of injury related to the controller.
 10

11 **C. A Portion of Plaintiffs' Damages Claims Are Legally Inadequate.**

12 Finally, this Court should grant Chart partial summary judgment on a portion of Plaintiffs'
 13 damages claims. They are not entitled to exemplary damages for any allegedly negligent failure
 14 to recall or, to the extent sought, under any other theory alleged in their Third Amended Complaint;
 15 and, G.H. is not entitled to seek damages related to her reduced odds of success of a live birth.
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17 For all of the reasons discussed above, Chart is entitled to summary judgment on Plaintiffs'
 18 negligent failure to recall claim. Additionally, the Plaintiffs' claim for exemplary damages fails:
 19 there is *no* evidence, much less clear and convincing evidence, sufficient to award exemplary
 20 damages in this case. Under California law, exemplary damages may be appropriate where a
 21 plaintiff shows by clear and convincing evidence that a defendant "has been guilty of oppression,
 22 fraud, or malice[.]" Cal. Civ. Code § 3294. Section 3294 defines all three terms: malice is
 23 "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct
 24 which is carried on by the defendant with a willful and conscious disregard of the rights or safety
 25 of others"; oppression is "despicable conduct that subjects a person to cruel and unjust hardship in
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1 conscious disregard of that person’s rights”; fraud is “intentional misrepresentation, deceit, or
2 concealment of a material fact known to the defendant with the intention on the part of the
3 defendant of thereby depriving a person of property or legal rights or otherwise causing injury.”
4 Cal. Civ. Code § 3294.

5 A plaintiff may be entitled to exemplary damages in the context of a products liability
6 claim, but *only* where the manufacturer’s conduct satisfies those criteria. *G.D. Searle & Co. v.*
7 *Superior Ct.*, (1975) 49 Cal. App. 3d 22, 27. Notably, “where the plaintiff’s ultimate burden of
8 proof will be by clear and convincing evidence, the higher standard of proof must be taken into
9 account in ruling on a motion for summary judgment or summary adjudication, since if a plaintiff
10 is to prevail on a claim for punitive damages, it will be necessary that the evidence presented meet
11 the higher evidentiary standard.” *American Airlines, Inc. v. Sheppard, Mullin, Richter &*
12 *Hampton*, (2002) 96 Cal. App. 4th 1017, 1049.

15 Here, there is no evidence that Chart acted with malice, oppression, or fraud related to any
16 of the allegations in this complaint. There is no evidence that Chart *intended* to cause injury to the
17 Plaintiffs. *See id.* If there is no evidence of intentional conduct, a plaintiff must show that a
18 defendant’s conduct is both willful and despicable. *In re Johnson & Johnson Talcum Powder*
19 *Cases*, (2019) 37 Cal. App. 5th 292, 332. Plaintiffs can prove neither here. Despicable conduct is
20 conduct “so vile, base, contemptible, miserable, wretched or loathsome that it would be looked
21 down upon and despised by most ordinary decent people.” *Mock v. Michigan Millers Mut. Ins.*
22 *Co.*, (1992) 4 Cal. App. 4th 306, 330. There is no evidence of any such conduct in this case.
23 Fundamentally, there is no evidence to support *any* claim for punitive damages, attached to *any* of
24 Plaintiffs’ allegations. Chart is entitled to partial summary judgment on that point.
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1 Further, Chart is entitled to partial summary judgment on one portion of G.H.'s damages
2 claim. She is not entitled to seek damages related to the diminished possibility of achieving a live
3 birth, where Plaintiffs' expert conceded G.H. had a less than 50 percent chance of a live birth using
4 the biological material stored in Tank 4. Under California law, a plaintiff must establish that her
5 claimed injury is more likely than not a result of the defendant's alleged negligence. *See Broome*
6 *v. Pavitt*, (1992) 5 Cal. App. 4th 1487, 1498-1500. Although there may be many possible causes
7 of an injury, mere possibility is not sufficient to establish a *prima facie* case. *Jones v. Ortho*
8 *Pharma. Corp.*, (1985) 163 Cal. App. 3d 396, 402. A possible cause "only becomes probable
9 when, in the absence of other reasonable causal explanations, it becomes more likely than not that
10 the injury was a result of its action." *Broome*, 5 Cal. App. 4th at 1498 (internal quotations and
11 citations omitted). G.H. cannot satisfy that requirement. Because there is no medical testimony
12 that the biological material G.H. stored in Tank 4 would more likely than not result in a live birth,
13 G.H. cannot prove that Tank 4's failure caused that alleged injury. Based on Plaintiffs' own expert
14 testimony, G.H. is precluded from any related claim of damages.
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18 In sum, Chart is entitled to summary judgment on all of Plaintiffs' claims, because they
19 cannot establish causation. Additionally, the Plaintiffs have offered no expert causation evidence
20 in support of their negligent failure to recall claim, or for any claims seeking damages related to
21 the failure of the controller in this case. Finally, the Plaintiffs are not entitled to any punitive
22 damages in this case, and G.H. is not entitled to damages because Plaintiffs' expert has stated Tank
23 4's failure is not the but-for cause of any failure to achieve a live birth with the biological material
24 in the tank.
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1 **V. CONCLUSION**

2 For all of the foregoing reasons, Chart requests that the Court grant its motion for summary
3 judgment.
4

5
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Respectfully submitted,

7 By: /s/ Kevin Ringel

8
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